Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1999

Chad Weisgram, et al.

and

State Farm Fire & Casualty Insurance Company,
Petitioners,

vs.

Marley Company, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Eighth Circuit so far depart from the accepted and usual course of judicial proceedings in abrogating the *Erie* doctrine relative to the substantive rule of law pertaining to Plaintiffs' burden of proof so as to call for an exercise of this Court's supervisory power?

2. If the District Court erred in admitting the testimony of the Plaintiffs' experts and the relief to be awarded is a new trial, is the United States Court of Appeals for the Eighth Circuit's decision in conflict with its own precedent and decisions of other United States Courts of Appeal if it granted judgment as a matter of law to Marley Company after excising portions of Plaintiffs' experts' testimony?

3. Does the United States Court of Appeals for the Eighth Circuit's determination that the District Court abused its discretion in admitting the testimony of Plaintiffs' experts conflict with relevant decisions of this Court relative to the District Court's discretion in determining the reliability of expert testimony, when the District Court determined that adequate support existed to mark Plaintiffs' expert testimony as reliable?

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INTERESTED PARTIES

Petitioner/Appellee Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent.

Petitioner/Appellee State Farm Fire and Casualty Insurance Company.

Respondents/Appellants Marley Company, a Delaware Corporation and its subsidiary, Marley Electric Heating Company, a Delaware Corporation; United Dominion Industries, Inc., a Delaware Corporation.

CITATION

Weisgram v. Marley Company, 169 F.3d 514 (8th Cir. 1999), *reh'g and reh'g en banc denied,* 1999 U.S. App. LEXIS 7977 (April 26, 1999).

STATEMENT OF BASIS FOR JURISDICTION

Date of judgment /order sought to be reviewed: February 23, 1999.

Petition for rehearing and petition for rehearing en banc denied April 26, 1999.

28 U.S.C. sec. 1254 confers on this Court jurisdiction to review on a writ of certiorari the judgment in question.

STATEMENT OF THE CASE

1. Evidence of Cause & Origin of the Fatal Fire

On December 30, 1993, Bonnie Weisgram died in a fire in her town home in Fargo, North Dakota. Upon arriving to investigate the fire, Capt. Freeman, a certified fire and arson investigator, found the exterior door closed and interior door open approximately 45 degrees. Fire was burning on the south (left) side of the front door (the Marley heater was located behind this door). No other visible fire was observed. A hole approximately two feet long was found under the Marley heater.

The entryway and sectional couch located on the upper level of the town home contained fire damage. No evidence of flaming combustion in the polyurethane couch cushions was found. No deep charring was found on the floor underneath the couch which would indicate flaming combustion. Freeman

found no evidence of damage to the ceiling above the couch, and, therefore no evidence of a flaming fire in the couch. Further, a piano located 1-1/2 feet from the couch was in good condition after the fire.

Freeman examined the entryway and observed deep charring along the south wall where the Marley heater was located. The hole in the floor was clear evidence that the fire burned most intensely and longest under the Marley heater. Captain Freeman observed significant damage to the ceiling above the entryway, directly over the hole in the floor. Freeman also observed heavy heat damage and discoloration on the bottom of the Marley heater. Freeman concluded that the fire started at the Marley heater.

Freeman also concluded that a rug covered a portion of the Marley heater while it was running, causing the vinyl floor to become very hot. Several witnesses testified that there was a "big throw rug" in the entryway prior to the fire that would sometimes catch and get pushed toward the Marley heater when the interior door was opened. Freeman believed the adhesive underneath the vinyl floor began to overheat and "off-gas" (vent) underneath the heater.

A remnant of a burned rug was found adjacent to the hole in the floor and was tested for accelerants. None were found. Freeman believed the open front door caused the rug to be pushed onto – and partially cover – the Marley heater prior to the fire, and off-gassing of the adhesive underneath the vinyl floor ignited the rug and other combustibles in the entryway.

Freeman found no evidence to support the possibility that the fire started in the couch by a cigarette. Marley's expert, on the other hand, testified that a smoldering middle cushion was placed behind the interior door and in front of the Marley heater by the decedent – Marley's only explanation for the hole in the floor and the cause of the fire. Marley's

expert admitted, however, that there was no evidence of a couch cushion in the entryway after the fire. Freeman testified that the middle cushion was still located on the couch when he investigated the fatal fire. He personally observed the cushion to be on the couch.

Ralph Dolence, a qualified professional fire investigator and expert for the Plaintiffs, received the Marley heater from the Fargo Fire Department and was provided with a set of photographs taken by Capt. Freeman. Dolence and Freeman also talked about the fire for over an hour. They talked about every possible source of the fire to narrow the focus of the investigation.

Dolence then examined the Marley heater and observed heavy damage an discoloration as a result of the fire. Dolence also examined the remnants of the heater's aluminum fins and found that approximately one-third of the fins survived the fire virtually unscathed. This demonstrated that a portion of the heater was uncovered when the fire began, because the heat from the fins was allowed to escape. The melted aluminum fins indicated that the heat underneath the covered portion was not allowed to escape and, instead, was reflected back into the heater.

After reviewing the physical evidence, Dolence concluded that the entryway rug was pushed onto the Marley heater, causing heat to be trapped in and around the heater. The Marley heater continued to produce heat until the adhesive underneath the vinyl flooring began "off-gassing." The temperature in and around the heater continued to rise until it reached the ignition temperature for the adhesive, approximately 435 degrees to 450 degrees F. Eventually, that portion of the rug covering part of the heater was consumed by the fire.

2. Evidence of Design Defect

Sandy Lazarowicz is a qualified metallurgist who testified on behalf of Plaintiffs. Lazarowicz testified that the Marley heater was defective because the silver regulating thermostat contacts contained serrations (serrations, in this case, are defined as grooves that appeared on the regulating thermostats' moveable arm contact). He also testified that the condition of the heater's aluminum fins after the fire was evidence of a blockage of the air flow.

The serrations observed and identified by Lazarowicz promoted electrical arcing and material transfer between the contact surfaces. He testified that approximately 25% of the silver on the moveable arm contact had been transferred to the stationary contact. He further testified that the regulating thermostat contacts separated after the temperature on the contact surfaces reached a point which allowed the metal to soften and "unweld."

Lazarowicz also compared the remnants of the Weisgram contacts with the exemplar contacts and found significant differences in the contact surfaces which proved the Marley contacts were welded together at the time of the fire. He testified that the regulating thermostat was defective because the contacts did not "mate" squarely which promoted electrical arcing and material transfer in one quadrant of the moveable arm contact. The uneven nature of the contact surface also caused the contacts to weld together at the time of the fire. Based upon his examination of the contacts, he concluded that the Weisgram heater started on fire because the excessive amount of electrical arcing and material transfer finally caused the contacts to weld together on the date of the fire. The heater failed to shut off.

Marley's own testing proved the design defect in the high limit control. That testing demonstrated that the high limit control did not turn off the heater until it reached dangerously high temperatures. Because of its placement behind a deflector shield at the top of the heater, the high limit control, in this case, did not sense the dangerously high temperature until after the fire started.

Marley's test results showed that a substantially similar 500-watt heater could produce sufficient heat to start a fire. In one test, the exemplar was allowed to run with the regulating thermostat and high limit control in place (normal operation). In that test, the air temperature in front of the heater reached 403 degrees before it turned off. In the same test, the aluminum fin tube which houses the heating element registered a temperature of 625 degrees F. It is important to note that the Marley heater had a regulating thermostat which is used to increase or decrease the temperature by turning a dial. It also had a high limit control designed to turn off the heater when it senses temperatures in excess of 190 degrees F.

In a second test by Marley, with the high limit control in place, the air temperature in front of the heater reached 417 degrees F before it turned off. This reading is 227 degrees F higher than the temperature that should trigger the high limit control and turn off the heater.

Capt. Freeman testified that the flash point of an oil-based adhesive used to affix vinyl flooring is approximately 140 degrees F and the ignition temperature is between 400 and 450 degrees F. Dolence similarly testified that an asphalt (oil) based adhesive is a relatively flammable material with an ignition temperature between 435 and 450 degrees F. Freeman also testified that the ignition temperature for a cellulose-based rug, similar to the rug in the Weisgram home at the time of the fatal fire, is between 375 and 520 degrees F.

3. Procedural History

Chad Weisgram, individually and on behalf of Bonnie Weisgram's heirs, commenced a lawsuit against Marley Company for the wrongful death of his mother. State Farm, which insured the Weisgram home, sued Marley to recover insurance benefits paid for the damage to the Weisgram town house and its contents, and (by assignment) benefits paid for the damage to the adjoining town house. The cases were consolidated and tried to a jury on the theory that Marley was strictly liable because the baseboard heater was defective. The jury awarded $500,000 to Chad Weisgram and the heirs of Bonnie Weisgram and $100,575.42 to State Farm. Marley's post-trial motions for judgment as a matter of law and motion for a new trial followed and were opposed by the Plaintiffs.

On September 4, 1997, Chief Judge Rodney Webb for the United States District Court for the District of North Dakota issued a Memorandum and Order denying Marley's post-trial motions. In his Memorandum and Order, Chief Judge Webb found no reason to exclude the testimony of Plaintiffs' experts and determined that adequate support existed to mark the testimony as reliable. Marley subsequently appealed. On February 23, 1999, in a 2-1 decision (Judge Bright, dissenting), the United States Court of Appeals for the Eight Circuit vacated the judgment for Plaintiffs after excising portions of Plaintiffs' experts' testimony and remanded the case to the District Court with instructions to grant Marley judgment as a matter of law. Rehearing and Rehearing En Banc was denied by the United States Court of Appeal for the Eighth Circuit on April 26, 1999.

28 U.S.C. sec. 1332 conferred jurisdiction on the District Court in the first instance. 28 U.S.C. sec. 1291 conferred

jurisdiction on the United States Court of Appeals for the Eighth Circuit.

ARGUMENT IN SUPPORT OF PETITION

I. This Court Should Exercise its Supervisory Power to Correct the Eighth Circuit's Radical Departure from the *Erie* Doctrine Relative to Plaintiffs' Burden of Proof.

Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the decisions of the North Dakota Supreme Court are binding on the Eighth Circuit panel majority in rendering their opinion in this case. The burden of proof is a rule of substantive law for *Erie* purposes. Therefore, North Dakota law provides the rule of decision relative to Plaintiffs' burden of proof and the federal courts must accept decisions of the North Dakota Supreme Court as definitive statements of North Dakota law. The Eighth Circuit was bound by decisions of the North Dakota Supreme Court, even if it believed the decisions unwise or incorrect. *See West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) (federal courts must "ascertain from all the available data what the state law is and apply it rather than prescribe a different rule, however superior it may appear").

Here, the Eighth Circuit panel majority neither correctly ascertained, nor correctly applied North Dakota law relative to Plaintiffs' burden of proof. The panel majority did not address the substantial circumstantial evidence of the defective condition of the Marley heater nor mention that under North Dakota law, circumstantial evidence will suffice to prove the existence of a defect.

Conclusive proof is not necessary to show the existence of a defect under North Dakota law. *Herman v. Gen. Irrigation Co.*, 247 N.W.2d 472, 478 (N.D. 1976); *Schmidt v. Plains Elec., Inc.*, 281 N.W.2d 794 (N.D. 1979) (in products

liability action arising out of fire which was allegedly caused by malfunction or faulty design of electric wall heater, circumstantial evidence was sufficient to support imposition of strict liability on grounds of malfunction or faulty design of heater). A defect may be inferred from proof that the product did not perform as intended by the manufacturer. *Herman*, 247 N.W.2d at 478.

At trial, sufficient evidence was offered and received from which inferences in support of the Plaintiffs' theory could reasonably be drawn. The able and experienced trial judge and jury accepted and found Plaintiffs' evidence more credible. "[I]t is for the jury to say what inferences shall be drawn, and they may be guided to their conclusion by the rule as to the burden of proof. Sometimes that rule may completely determine the result of a trial." *Fort Dodge Hotel Co. v. Bartelt*, 119 F.2d 253, 259 (8th Cir. 1941).

Plaintiffs' experts' opinions on the cause and origin of the fire and the physical evidence overwhelmingly support the jury's determination that the fire causing Bonnie Jo Weisgram's death resulted from a defect in the Marley heater. This question of fact, decided by the jury upon conflicting evidence, must not be subject to re-examination by a panel majority of the United States Court of Appeals for the Eighth Circuit.

Because the panel majority effectively abrogated the *Erie* doctrine by refusing to follow decisions of the North Dakota Supreme Court relative to Plaintiffs' burden of proof, this Court should grant this petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. This Court should exercise its supervisory powers to ensure that State substantive rights are not trampled upon by a two judge majority of a court of appeals attempting to usurp both the role of the jury and an able and experienced District Court.

II. The Eighth Circuit's Decision to Grant Judgment as a Matter of Law to Marley Company After Excising Plaintiffs' Experts' Testimony is Improper and Conflicts with its Prior Decisions and Decisions of Other Circuits.

The Eighth Circuit panel majority's overreaching directive to grant Marley Company judgment as a matter of law conflicts with its prior decisions and those of other Circuits. It has long been the law of the Eighth Circuit that if the District Court indeed erred in admitting the testimony of Plaintiffs' experts, the relief to be granted is a new trial, not judgment as a matter of law. *See Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 359 (8th Cir. 1973) (holding that the proper remedy for disposing of evidence erroneously admitted during the course of the trial is a new trial).

The Eighth Circuit's decision also conflicts with the decisions of other Circuits that have adopted the same rule. Four additional Circuits have held that, when deciding a motion for judgment as a matter of law, a court may not ignore evidence erroneously admitted at trial. *See, e.g., Schudel v. General Elec. Co.*, 120 F.3d 991, 995 (9th Cir. 1997) (reasoning that "[t]he record should be taken as it existed when the trial closed" and that the rule promotes certainty and fairness); *Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 696 (11th Cir. 1993) (stating that if evidence is ruled inadmissible during trial, the plaintiff has the opportunity to introduce new evidence, but when evidence is ruled inadmissible in the context of a motion for JNOV [now JAML] the plaintiff is unable to remedy the situation); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343-44 (6th Cir.

1992) (reasoning that it is wholly improper to ignore evidence admitted at trial when considering a motion for JNOV [now JAML] and that the evidence must be taken as it existed at the close of trial); *Dixon v. International Harvester Co.*, 754 F.2d 573, 580 (5th Cir. 1985) (holding that it is impermissible for court to rule on a motion for JNOV [now JAML] by ruling at the time of its determination that certain evidence presented at trial was inadmissible); *Sumitomo Bank v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983) (same).

In order to maintain and secure the uniformity of decisions and to resolve conflicts between the Circuits on this issue, this Court should grant the present petition for certiorari to the United States Court of Appeals for the Eighth Circuit.

III. The Eighth Circuit Failed to Give the District Court the Deference that is the Hallmark of Abuse of Discretion Review.

Irrespective of established precedents and unequivocal mandates of this Court, the panel majority of the United States Court of Appeals for the Eighth Circuit gave no deference to the District Court and, more or less, reviewed the District Court's admission of Plaintiffs' experts' testimony de novo. *Cf. Kumho Tire Co. v. Carmichael*, 119 S.Ct. (1999); *General Elec. Co. v. Joiner*, 118 S.Ct. 512 (1997).

In this case, Chief District Court Judge Rodney Webb found no reason to exclude the testimony of Plaintiffs' experts, as each of the experts were qualified to render their opinions which were well-grounded in established methodologies. After analyzing the testimony in light of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the District Court found that no *Daubert* problems

were present. The District Court evaluated the underlying factual support and evidence supporting the experts' bottom-line opinions and determined that adequate support existed to mark the testimony as reliable. The Eighth Circuit's standard of review was improper and their decision goes too far, making a critical error in analyzing reliability by impermissibly assessing plaintiffs' experts' credibility – the province of the jury. A proper application of the correct standard of review in this case indicates that the District Court did not abuse its discretion.

District Court judges, unlike appellate judges, have a broad array of tools which can be brought to bear on the evaluation of expert testimony. Because of this special vantage point, it is quite odd and contrary to law for the Eighth Circuit panel majority to substitute its interpretation of the evidence for that of the District Court.

The Eighth Circuit's position is in conflict with decisions of this Court. If allowed to stand, the discretion of District Courts within the Eighth Circuit will be effectively subverted relative to evidentiary rulings of a similar nature. Accordingly, this Court should grant the requested petition for certiorari to the United States Court of Appeals for the Eighth Circuit.

CONCLUSION

For the reasons stated above, Petitioners Chad Weisgram and State Farm respectfully request that the Court grant their petition for certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 97-3735

Chad Weisgram, individually and on behalf Of the heirs of Bonnie Jo Weisgram, decedent,

Appellee,

v.

Marley Company, a Delaware Corporation and Its subsidiary, Marley Electric Heating Company, A Delaware Corporation; United Dominion Industries, Inc., A Delaware Corporation,

Appellants.

Appeal from the United States District Court for The District of North Dakota

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State Farm Fire & Casualty
Insurance Company,

Appellee,

v.

Marley Company, a Delaware
Corporation; Marley Electric
Heating Company, a Delaware
Corporation; United
Dominion Industries, Inc., A
Delaware Corporation,

Appellants.

Submitted: November 16, 1998
Filed: February 23, 1999

Before BOWMAN, Chief Judge, BRIGHT, and MAGILL, Circuit Judges

BOWMAN, Chief Judge.

Marley Company appeals from the judgment of the District Court, entered upon a jury verdict, awarding damages to Chad Weisgram, individually and on behalf of the heirs of Bonnie Weisgram, and to State Farm Fire and Casualty Company. We vacate the judgment and remand for entry of judgment as a matter of law in favor of Marley.

I.

On December 30, 1993, at approximately 6:00 a.m., firefighters were called to the town house of Bonnie Weisgram in Fargo, North Dakota, when an off-duty firefighter noticed flames around the front entrance to the home. The front door of the residence was open (although the storm door was closed), notwithstanding the sub-freezing outdoor temperature. Firefighters entered the town house and found Bonnie Weisgram's body lying face down on top of a large, broken mirror, in the upstairs bathroom of the split-entry residence. They also found an open window in Weisgrams's upstairs bedroom, which adjoined the bathroom where the body was found. The cover of the smoke detector located in the ceiling of the upstairs hallway had been removed and was found on the carpeted floor of Weisgram's bedroom, where it had been laying since before the fire produced the soot that covered the exposed areas of carpeting. A folding chair was on the floor, folded up, near the detector cover. Upstairs in the living room, an L-shaped sectional sofa was badly damaged by fire in both sections. The back of one section of the sofa was along a metal railing that was open to the entryway and immediately to the right (north) of the entrance at about shoulder level when standing in the entryway; the other section, equally damaged, was along the adjoining (east) wall upstairs. To the left of the entrance, directly in front of the south entryway wall, there was a hole burned through the floor of the entryway. A fifteen-year-old baseboard heater manufactured by Marley had been mounted on that south wall before the fire. There was structural fire damage around the entrance of the town house. The remainder of the residence, including the area downstairs from the entryway, suffered damage from smoke, heat, and water, but no fire damage.

An autopsy determined that Weisgram had died from smoke inhalation, that is, carbon monoxide poisoning, at approximately 2:30 in the morning. There is no dispute that the likely source of the carbon monoxide was the smoldering sofa. Further, Weisgram's blood alcohol level was 0.15, and there was evidence that she had taken a drug that generally is prescribed to relieve pain and as a sleep aid, although it was not clear from the tests whether she took it that night. She was last seen alive at 11:00 p.m. the evening of December 29 by her fiance', who observed her drink an alcoholic beverage and smoke a cigarette before he left.

Weisgram's adult son, Chad[1], individually and on behalf of Bonnie Weisgram's heirs, sued Marley for the wrongful death of his mother. State Farm, which insured the Weisgram home, sued Marley to recover insurance benefits paid for the damage to the Weisgram town house and its contents, and (by assignment) benefits paid for the damage to the adjoining Ferguson town house. The cases were consolidated and tried to a jury on a theory that Marley was strictly liable because the baseboard heater was defective. The jury awarded $500,000 to Chad and the heirs and $100,575.42 to State Farm. Marley's motion for judgment as a matter of law (JAML) and its motion for a new trial both were denied. Marley appeals.

II.

We review de novo the District Court's decision to deny Marley's motion for JAML. See Finley v. River N. Records, Inc., 148 F.3d 913, 917 (8th Cir. 1998). We view the evidence

[1] Chad was not at home the night of the fire. Bonnie Weisgram had another adult son, Ryan, who was not living in the home at the time of the fire.

in the light most favorable to Chad Weisgram and State Farm, and will not reverse the court's decision unless all of the evidence properly admitted "points [Marley's] way and is susceptible of no reasonable inferences sustaining [Weisgram and State Farm's] position." Wright v. Willamette Indus., Inc., 91 F.3d 1105, 1106 (8th Cir. 1996).

We initially consider the plaintiffs' burden of proof in this strict liability case. In order to prevail under North Dakota law, the plaintiffs were required to prove by a preponderance of the evidence that the heater "was defective in design or manufacture; the defect rendered the product unreasonably dangerous to the consumer; the defect existed when the product left the manufacturer; and the defect was a proximate cause of the [plaintiffs'] injuries." Endresen v. Scheels Hardware & Sports Shop, Inc., 560 N.W.2d 225, 229 (N.D. 1997); see also N.D. Cent. Code § 28-01.3-06 (Supp. 1997) ("No product may be considered to have a defect or to be in a defective condition, unless at the time the product was sold by the manufacturer or other initial seller, there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer.") After hearing oral argument, it is not entirely clear to us whether the plaintiffs are allegingthat the heater had a design defect, a manufacturing defect, or possibly no defect at all. In any case, however, we hold that JAML should have been granted for Marley.[2] The District Court abused its discretion

[2] We reject any contention that we are required to remand for a new trial because our failure to do so would deny the plaintiffs the opportunity to reopen discovery and identify additional witnesses who might testify to their theory of liability. Although Federal Rule of Civil Procedure 50(d) certainly gives this Court the discretion to remand for a new trial, we can discern no reason to give the plaintiffs a second chance to make out a case of strict liability. See Wright v. Willamette Indus., Inc., 91 F.3d 1105, 1108 (8th Cir. 1996) (reversing denial of JAML because improper expert testimony was admitted by the district court); see also Peitzmeier v.

in allowing certain opinion testimony at trial. Once that testimony is removed from consideration, the evidence properly admitted is insufficient to prove by a preponderance that the heater was defective at the time Marley sold it, much less that any purported defect rendered the heater unreasonably dangerous and proximately caused the fire that resulted in the tragic death of Bonnie Weisgram and the damage to her home. See McKnight v. Johnson Controls, Inc., 36 F.3d 1396, 1400 (8th Cir. 1994) ("A motion for [JAML] presents a legal question to the district court and to this court on review: 'whether there is sufficient evidence to support a jury verdict.'") (citation to quoted case omitted). Thus Marley is entitled to judgment as a matter of law on plaintiffs' claims.

III.

We first examine the challenged testimony. Under Federal Rule of Evidence 702, "a witness qualified as an expert by knowledge, skill, experience, training, or education" may give opinion testimony if, and to the extent, "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." It is the role of the district court to make certain that testimony admitted under Rule 702 "is not only relevant, but reliable." Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993); see also Wood v. Minnesota Mining & Mfg. Co., 112 F.3d 306, 309 (8th Cir. 1997).[3] As we explain below, portions of the testimony from three of the plaintiffs' witnesses were unreliable, and the District Court abused its admittedly broad discretion in allowing the suspect testimony. See Peterson v. City of Plymouth, 60 F.3d 469, 475 (8th Cir. 1995) (standard of review). Further, we can say that the errors were not harmless, as they had "'substantial influence' on the jury's verdict." Id. (quoting McKnight, 36 F.3d at 1405).

Hennessey Indus., Inc., 97 F.3d 293, 296 (8th Cir. 1996) (affirming district court's decision to grant summary judgment on the grounds that certain expert testimony was inadmissible "and that based on the admissible, undisputed evidence [defendant manufacturer] was entitled to judgment as a matter of law"), cert. denied, 117 S.Ct. 1552 (1997). This is not a close case. The plaintiffs had a fair opportunity to prove their claim and they failed to do so.

A.

We begin with the testimony of Dan Freeman, the Fargo fire captain who arrived with the first fire truck on the scene of the fire at the Weisgram home. He also was the firefighter who did the investigation for the Fargo fire department. Freeman testified that he had considered whether careless smoking might have started the fire in the sofa, but he rejected that possibility because he saw no smoking materials in the

[3] Now pending before the Supreme Court is the case of Kumho Tire Co. v. Carmichael, No. 97-1709 (argued Dec. 7, 1998), which raises the question whether *all* expert testimony admitted pursuant to Rule 702 is subject to review under the four reliability factors set forth in Daubert, or whether it is only "scientific" testimony to which the test applies. Cf. Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1297 (8th Cir. 1997) (noting that "[t]here is some question as to whether the Daubert analysis should by applied at all to 'soft' sciences such as psychology") cert. denied, 118 S. Ct. 2370 (1998). We need not get into that thicket ourselves, as the testimony at issue here should have been excluded under Rule 702 as unreliable whether or not the four Daubert factors are considered. Although the Daubert Court had before it only the question of the admissibility of scientific testimony, see 509 U.S. at 590 n.8, the general principles of reliability and relevance for which we cite Daubert obviously apply to all Rule 702 expert testimony, regardless of subject matter.

home and because he did not think the burn pattern in the sofa indicated that the fire began as the result of careless smoking.[4] He opined that the fire started in the area of the baseboard heater and that "radiated heat...ignited the material on the backside of that couch." Trial Tr. Of May 20, 1997 (testimony of Dan E. Freeman), at 34. The sofa was six to eight feet away from the heater at shoulder height and shielded at least partially from any radiated heat or flame by the open front door, which was constructed of insulated steel. The witness then was allowed to testify, over objection, that the fire started because "we had a malfunction of the heater." Id. at 63. Notwithstanding Freeman's admission that he was "not an electrical expert" and that he did not "know what happened with the heater," he nevertheless was allowed to testify that he "believe[d] that we had a runaway of that heater." Id. at 64. Although Freeman clearly was qualified as a fire cause and origin expert, there is no question that he was not qualified to offer an opinion that the Weisgram heater malfunctioned and he should not have been permitted to do so.

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[4] The testimony of Marley's witnesses advanced this scenario for the cause and origin of the fire: At some time that night, Bonnie Weisgram dropped a lighted cigarette behind a cushion of the sofa, which eventually started a smoldering fire. The smoke detector activated, and Weisgram disabled it. Believing she had doused the fire in the couch, she removed the sofa cushion to the entryway. At some point, she opened the bedroom window and the front door to clear the house of smoke. The cushion and the sofa continued to smolder, producing the smoke and the carbon monoxide that eventually killed Weisgram. Under the influence of the alcohol she had consumed and the sleeping aid she had taken, she was unaware that the fires continued to burn until it was too late. The smoldering cushion in the entryway slowly burned through the floor and eventually caused the flaming fire around the entrance that was spotted at 6:00 a.m.

We need not-and do not-adopt Marley's version of events in order to conclude that JAML should have been granted to Marley.

Moreover, Freeman's testimony regarding the events that followed the surmised "runaway" amounted to nothing more than blatant speculation:

> I believe that we ignited nearby combustibles, namely, the, possibly the throw rug or area rug that was on that vinyl floor was very possibly pushed up against that heater...That up against the heater would contain the heat, would trap it, would cause it to build up to the point where you could have had ignition of that cellulose based product [the jute backing on the rug]....In addition to that, the heat build up would start to cause other things to start what we call off gassing. The vinyl floor is going to warm up, the vinyl floor is stuck to the floor with a glue, a plastic. There are several types on the market but one of them there is an asphalt base type. There is another type...ones I have looked into have got products in them that will off gas and ignite such as a naphtha, ethylene glycol...It's a solvent. Basically it's an accelerant. It will off gas and it will cause vapors to disperse. It will loosen up. Those vapors are going to try to find a way to escape from underneath that vinyl. Normally that would be at the edge of the wall where the vinyl floor meets the wall. I believe the ignition temperature of naphtha is probably somewhere in the neighborhood of 400, 450 degrees. The flash point is considerably lower than that...[B]y flash point I mean it will give off enough vapors to ignite briefly if there is a heat source to ignite.

Id. at 64, 665-66. Now, as a qualified expert in fire investigation, Freeman was free to testify-as he did-that the burn and smoke patterns and other physical evidence indicated that, in his opinion, the fire started in the entryway and radiated to the sofa. Freeman's further testimony, however, was patent speculation, as there was no evidence in the record regarding the location of the throw rug when the fire started, the type of vinyl linoleum on the floor, the glue used some fifteen years prior to secure the vinyl to the underflooring, or the flammability of the vinyl or the glue.[5] While Freeman was qualified to testify that he thought the fire originated in the area of the baseboard heater, we think the court abused its discretion when it permitted Freeman to "run away" with his own unsubstantiated theories: that the throw rug somehow blocked the heater, that the rug then ignited, that the heater transferred sufficient heat to the floor so that the adhesive under the vinyl flooring (and adhesive whose composition and other characteristics are unknown) "off gassed," and that the heater radiated enough heat so that those vapors—whatever they were—ignited. Freeman's qualification as a fire investigator did not give him free rein to speculate before the jury as to the cause of the fire by relying

[5] As the individual assigned to investigate the Weisgram fire, Freeman would have been responsible for taking samples of these items for analysis. Nevertheless, he sought only samples of the burned rug from the area around the burn-through in the floor in the entryway (and Freeman had another firefighter retrieve those samples after Freeman left the scene). Freeman had these samples tested for composition and to see whether there was an accelerant present. The only other evidence gathering Freeman did was to take some photographs and to retrieve the burned baseboard heater. It is clear from his testimony that from the very beginning Freeman thought the baseboard heater caused the fire, see, e.g., Trial Tr. of May 20, 1997 (testimony of Dan E. Freeman), at 77-78, 81, which probably explains the limited evidence he collected. State Farm, which also was early on the scene, did not gather any evidence either, as far as we can tell from the record.

on inferences that have absolutely no record support. No foundation was established for Freeman to testify to the extent he did, and the court abused its discretion in allowing the jury to hear this testimony.

B.

Marley also challenges the reliability of the testimony of Ralph Dolence. Within days after the fire, Freeman told Dolence "that we had a fire that appears to have originated in and around an electric baseboard heater" and sent him the remains of the baseboard heater. Id. at 81. Dolence testified as a "fire investigator" and "technical forensic expert." Trial Tr. of May 21, 1997 (testimony of Ralph Dolence), at 4. As a master electrician in Ohio, he also had experience consulting on electrical fires, although that is irrelevant in this case as there is no contention that the Weisgram fire was electrical. He denied being an "expert electrician" but testified that he was "an electrical expert in electrical things." Id. at 108-09.

Dolence's theory of the fire, not surprisingly, was the same as Freeman's. Dolence never went to the Weisgram town house. As he testified at trial, he drew his conclusions largely from the observations Freeman made at the scene of the fire: "Based on the examination of the heater and the physical evidence that Captain Freeman and I had discussed and the photographs which I interpret as physical evidence, the hole in the floor in my opinion was made by a couple of things." Id. at 50-51. Dolence went on to conjecture that a small rug was pushed over two-thirds of the heater, that the heat was "trapped in there and was focused down on to the... linoleum," that "volatile vapors from the adhesive come [sic] into the location of the heater," and that "[t]he ignition of those vapors is what caused this fire." Id. at 51. And

Dolence's basis for this theory? "There is no other explanation. Everything else is ruled out...by Captain Freeman." Id. at 52. Dolence did no testing to bolster this theory and admitted that he knew of no tests that anyone had conducted to support a similar theory of fire cause and origin. See id. at 171. As with Freeman's testimony, there was insufficient foundation for Dolence's testimony; the ostensibly expert opinion testimony he offered was rank speculation.

Dolence noted that the "thermostat or other components" of the heater were destroyed, "in a crumpled mass," id. at 88, and so he did not test them. He nevertheless testified that his theory of how the fire started-runaway heater, off gassing, ignition of vapors-could be true only if the thermostat (designed to shut the heater off at a comfortable room temperature set by the user) failed, followed immediately by the failure of the backup high limit control (designed to shut the heater off when it sensed a temperature of 190 degrees.) See id. at 90-92, 129. Therefore, he opined, after fifteen years of operating without incident, both the thermostat and the high limit control suddenly and simultaneously "did not function" to shut the heater off. Id. at 105. To be "fair and honest," however, Dolence was compelled to testify that he could not identify what caused the heater to run away and that he had "no idea what caused the thermostat to fail." Id. at 126; see also id. at 137, 187. He also could not determine what caused the high limit control to fail. See id. at 138, 187. Finally, he agreed with the proposition that there were no design defects in the heater, in part because, during testing, he could not create a similar overheating episode in the undamaged exemplar Marley heater that had been retrieved after the fire from the adjoining Ferguson town house. See id. at 139, 143. He thought there was the possibility of a

manufacturing defect in the Weisgram heater, but he had been unable to identify one. See id. at 145-46, 148. Upon examining the contacts[6] of both the thermostat and the high limit control of the Weisgram heater, Dolence testified, "I was bothered by the condition of things I saw on some of this evidence." Id. at 100. Therefore he sought the assistance of a metallurgist, but Dolence could offer no opinion of his own about the contacts or what may have caused the presumed failure of the thermostat and the high limit control. See id. at 101.

In these circumstances, the District Court abused its discretion by permitting Dolence to testify as an expert witness regarding matter about which he could only speculate. As with Freeman's testimony, there is no reasonable factual basis for Dolence's opinions. Dolence's own testimony attests to the fact that he was offering nothing more than pure conjecture as to whether or not the Weisgram heater was defective. The testimony therefore was unreliable under Rule 702 and should have been excluded.

C.

The metallurgist Dolence contacted was Sandy Lazarowicx. Dolence told Lazarowicz his theory of the fire and asked him to take a look at the Weisgram heater. Lazarowicz examined the thermostat contacts and the high limit control contacts from the heater and studied the same components in the Ferguson heater. He was qualified as an expert in the properties of metals. Admittedly, however, he was not an expert in fire cause and origin, in baseboard heater

[6] When the contacts are closed, that is, touching, the circuit is complete and current flows through the appliance. The circuit is broken-current through the unit is cut-when the contacts are separated, or open.

operation, or in the design or testing of contacts in such a unit. See Trial T. of May 27, 1997 (testimony of Sandy Lazarowicz), at 16-17, 64.

He testified that the thermostat contacts were defectively designed because they were serrated. The rough surfaces caused arcing and material transfer between the contacts. He theorized that "the continual usage and build up of defects on the surface" of the contacts must have caused them to weld, and that they could not then pull apart (at least not until the heat from the fire in the home softened the weld). Id. at 81. Thus, he said, there was a closed circuit, the heater did not shut off, and that is why the unit overheated. He formulated his theory knowing practically nothing about the Weisgram heater, or any other baseboard heater for that matter. For example, when he formed his opinions he was unaware of the heater's wattage or the amperage it drew, and therefore could not say if the thermostat contacts could have reached a high enough temperature to melt the metal and to form a weld *before* the fire. See id. at 69-71, 73. He performed no tests to determine whether it was even theoretically possible that the contacts could get sufficiently hot to weld during operation of the heater. In fact, in his first deposition, Lazarowicz was unable to say for certain that the contacts actually had welded, notwithstanding his examination of them under an electron microscope. Only after closer examination of the contacts from the Ferguson exemplar was he able to see the evidence of welding in the Weisgram contacts. We think the District Court abused its discretion when it permitted this testimony from Lazarowicz.

Further, as we have explained, the heater had a backup system that would prevent it from dangerously overheating even if the heater ran amok because the thermostat failed to shut it off: the high limit control. In order for the heater to be

defective in the way the plaintiffs theorize, the high limit control had to fail to shut off the electrical current to the heater at the very same time that the thermostat was failing. Lazarowicz testified that the high limit contacts did not open when the unit was energized (receiving current), but opened only after the fire was well underway. He theorized that this failure may have occurred because the high limit control's temperature sensing mechanism was placed within the unit in a location where it could not detect the actual temperature of the heater.[7] He had metallurgic evidence for the opinion that the contacts did not open while electricity was flowing through the heater (and, in fact, other witnesses noted the same evidence). But he had no metallurgic reason for his conclusion that the device was not properly sensing the temperature, because, of course, that is not a metallurgic issue. Lazarowicz testified that he had performed no tests on the Ferguson exemplar to see if its high limit switch functioned properly, or to determine if in fact there was a defect (in design) in that similar heater. He did not have the necessary experience-either from his work as a metallurgist or from tests performed in connection with this case-to be qualified as an expert who could testify that the high limit control failed because it was defectively designed or manufactured.

Lazarowicz's opinions amount to no more than "subjective belief or unsupported speculation." Daubert, 509 U.S. at 590. We conclude that the nexus between his observations of the contacts and his conclusion that the heater was defective is not scientifically sound. He admittedly had

[7] At oral argument, counsel for plaintiffs said the high limit control was not defective and did not fail, but simply did not shut off the heater when it should have. It is not clear to us, then, what the plaintiffs' theory of liability now is. We continue with our analysis, however, under the theory submitted to the jury: strict products liability because of a design or manufacturing defect.

very limited experience with electrical contacts in small appliances and no experience with how contacts function in baseboard heaters. "[T]here is simply too great an analytical gap between the data and the opinion proffered." General Elec. Co. v. Joiner, 118 S.Ct. 512, 519 (1997). Therefore, his testimony was unreliable and it was an abuse of discretion to allow it.

D.

We have read very carefully the entire transcript of the trial in this case. Freeman, Dolence, and Lazarowicz were the plaintiffs' only witnesses to testify to the theory of liability on which this case was based: that the baseboard heater was defective in design or manufacture.[8] Neither Freeman nor Dolence were qualified under Rule 702 to testify that the heater was defective, and it was an abuse of the District Court's discretion to allow their testimony to that effect (not to mention their rampant speculation about how the "runaway" heater then might have ignited the fire). Further, Lazarowicz's testimony about the defective thermostat contacts and the placement of the high limit control also was not sufficiently reliable under Rule 702 to have been admitted in evidence. Because these witnesses offered the only evidence of defect, their testimony obviously had a substantial influence on the jury's decision to find Marley strictly liable

[8] Dolence testified that the heater was *not* defectively designed, but that it may have had a manufacturing defect that he simply could not identify. Lazarowicz testified that the defects *were* in the design of the heater—the serrated contacts on the thermostat and the placement of the high limit control sensor—but he also said there was *no* design defect in the high limit control. These contradictions from the plaintiffs' own witnesses are yet another indication that the jury reached a finding that the heater was defective only by engaging in speculation.

for damages. Bonnie Weisgram's death in this fire was a tragedy and the damage to the town houses was unfortunate. But if the heater cannot be proven to have been defective when Marley sold it, then under North Dakota law of strict products liability the plaintiffs cannot prevail-even assuming Freeman and Dolence are correct about the off gassing adhesive and the rest of their theory relating to the cause of the fire. Without the testimony at issue, the jury's verdict cannot stand.

IV.

Marley raises a number of other issues, all of which it is unnecessary for us to address in order to resolve the appeal.

The plaintiffs' motion for relief under Federal Rule of Appellate Procedure 38 for certain arguments advanced by Marley on appeal (arguments we do not address) is denied.

V.

The judgment for the plaintiffs is vacated and the case is remanded to the District Court with instructions to grant Marley judgment as a matter of law.

BRIGHT, Circuit Judge, dissenting.

I dissent. I would deny Marley's motions for a new trial and judgment as a matter of law. The jury verdict has adequate support from properly admitted expert testimony. The plaintiffs' theory of the case relied on the testimony of two properly qualified fire investigators and a properly qualified metallurgist. This testimony provided evidence that the fire originated with the heater and that defects in the thermostat contacts and the placement of the high limit control contributed to the fire. The experts arrived at their conclusions by personally inspecting the evidence from the fire scene using accepted investigative techniques. Although each expert may have testified on matters outside his particular area of expertise, these matters went to the weight and not the admissibility of the testimony. Moreover, the experts' experience lent support to this testimony.

Fire cases differ from most accident cases because fires tend to destroy evidence of causation. As a result, theories about the cause of fires inevitably rest on circumstantial evidence. Arson and insurance cases, as well as product liability cases like this one, require expert evaluations to determine the cause of fires. The courts traditionally permit qualified fire investigators to express opinions on the cause of fires.

For example, in Talkington v. Atria Reclamelucifers Fabrieken BV (Cricket BV), 152 F.3d 254 (4th Cir. 1998), a

product liability case, the court affirmed a jury verdict for the plaintiffs which rested on the testimony of two fire investigators. The fire investigators discovered the body of a child in close proximity to a cigarette lighter and a sofa. See id. at 260. They also conducted a test in which they compared the sofa to a sofa ignited with a cigarette and an open flame. See id. at 265. At trial, the investigators testified that the fire occurred because the child ignited the sofa with the cigarette lighter. See id. at 264-65. The court upheld the admission of this testimony. The experts qualified as fire investigators and gave reasoned explanations for rejecting alternative explanations, including the defense theory that a cigarette started the fire. See id. at 264-66.

Similarly, in Marshall v. Humble Oil & Refining Co., 459 F.2s 355 (8th Cir. 1972), this court affirmed a jury verdict finding the defendants liable for an explosion in a poorly ventilated gas station storeroom. The plaintiffs contended that the explosion occurred when a spark from an air compressor switch ignited accumulated gas vapors. See id. at 357-58. This theory rested on the discovery of soot in the storeroom after the fire, testimony that the storeroom door was found closed immediately after the explosion, and the fact of the explosion itself. See id. at 358-60. This court held that the plaintiffs presented sufficient evidence of causation even though the compressor switch itself showed no fire damage. See id. at 359-60.

In this case, the jury was required to determine the cause of the fire that killed Bonnie Weisgram in her home. Plaintiffs Weisgram and State Farm argued that a defect in the baseboard heater caused the fire. The court must determine whether the plaintiffs presented reliable evidence of their theory by

experts who possessed the necessary qualifications.[9] Under Rule 702, a witness can testify as an expert if his knowledge qualifies him to offer an opinion that will assist the trier of fact in arriving at the truth. See Fed. R. Evid. 702; Pelster v. Ray, 987 F.2d 514, 526 (8th Cir. 1993). Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony. See Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1298 (8th Cir. 1997). The rule "'is one of admissibility rather than exclusion.'" Id. (quoting Arcoren v. United States, 929 F.2d 1235, 1239 (8th Cir. 1991)). We review district court decisions on the qualifications and reliability of experts for an abuse of discretion. See General Elec. Co. v. Joiner, 118 S. Ct. 512, 517 (1997). With this standard in mind, I review the district court's decision to admit the testimony of the plaintiffs' experts.

The plaintiffs first called Captain Dan Freeman of the Fargo Fire Department. Freeman was the first person to arrive at the fire scene. Freeman testified as a fact witness and to some extent as an expert. Freeman testified that the fire originated in the entryway. Upon arrival, he saw a fire burning on the south side of the entryway. He saw no other fire in the house. After searching for survivors and removing Bonnie Weisgram's body, Freeman began to investigate the cause of the fire. He first considered the sofa as a source of

[9] In answering that question in the negative, the majority cites Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) for support but also recognizes that the Daubert analysis for the admission of expert scientific testimony may not apply to non-scientific testimony. Maj. Op. at 6 n.3. As the majority has noted, Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997), cert. granted sub nom., Kumho Tire Co. v. Carmichael, 118 S. Ct. 2339 (1998), now before the Supreme Court, raises the issue whether the factors enunciated in Daubert for the admissibility of scientific evidence also apply to non-scientific evidence.

the fire, but discarded that possibility when he inspected the sofa and the surrounding area. The sofa exhibited signs of smoldering combustion but not flaming combustion. Freeman saw no charring on the floor beneath the sofa or damage to the ceiling above the sofa. Furthermore, a piano located within 1 1/2 feet of the sofa remained in good condition. As Freeman continued to investigate, he determined that the fire originated in the entryway and spread to the sofa. The sofa suffered the most damage on its backside, which was exposed to the entryway, and there was charring on the woodwork inches from the backside of the sofa. Freeman testified that a fire strong enough to char the woodwork could have ignited the sofa. Freeman also saw evidence of flaming combustion in the entryway. A two-foot long hole had been burned through the floor underneath the heater and the ceiling above the heater had suffered significant damage.

The plaintiffs next called Ralph Dolence, a professional fire investigator, to testify as an expert witness. Dolence listened to Freeman's description of the fire scene and inspected the heater and photographs of the fire scene. Dolence testified that the fire originated with the heater. In his opinion, a throw rug pushed up against the heater caused heat to accumulate in and around the heater.[10] The excess heat caused the glue on the vinyl flooring beneath the heater to vaporize and ignite. The fire spread to the walls and ceiling in the entryway and eventually to the sofa in the living room. To support his conclusions, Dolence testified that burn patterns on the heater indicated that it had been partially covered during the fire and that it had been exposed to extreme heat underneath. Dolence also testified that asphalt-based

[10] Three frequent visitors to the Weisgram home testified that no entryway throw rug would frequently get pushed up against the heater by the movement of the entryway door.

glue used in vinyl flooring has an ignition temperature of approximately 450 degrees. Dolence's testing of the exemplar heater demonstrated that the heater could reach a temperature of 750 degrees.

As their third expert, the plaintiffs called Sandy Lazarowicz, a metallurgist. Lazarowicz had performed failure analysis on the thermostat contacts and had inspected the high limit control. Lazarowicz's testimony provided evidence of defects in the thermostat contact and the placement of the high limit control that resulted in their failure to shut down the heater at the time of the fire. He testified that serrations on the contact surfaces and mismatching of the contacts caused electrical arcing and material transfer, which in turn caused the contacts to weld.[11] Lazarowicz also testified that the high limit control did not detect the heat build-up before the fire because it was placed behind a deflector shield.

Freeman and Dolence possessed ample qualifications to testify as experts on the cause of the fire. Freeman was a certified fire investigator and had investigated over 100 fires in addition to completing 400 hours of training in fire and arson investigation. Dolence had been investigating fires for over fifteen years and had directed fire investigation units in two municipalities. While neither Freeman nor Dolence had worked with the type of heater found in the Weisgram home, they both had experience investigating fires caused by heaters and other electrical appliances. Thus, in my view they were qualified to offer opinions on whether the heater caused the

[11] Defense experts Michael Phy, Richard Moore, and Vincent Acampora testified that the thermostat contacts showed evidence of electrical arcing and material transfer. Dolence testified that he observed serrations on the surface of the contacts, something he had never seen before even though he had inspected thousands of contacts. Marley's own witness, Richard Moore, likewise testified that he had seen over 1,000 contacts, none with serrations.

Weisgram fire. Dolence possesses particularly relevant qualifications. He is a master electrician who has investigated a number of electrical fires and has written a book on the subject. He was well-qualified to give his opinion that a malfunction in the electrical components of the heater caused the fire. The district court did not abuse its discretion in permitting Freeman and Dolence to testify.

Lazarowicz also possessed sufficient qualifications to testify about defects in the thermostat contact and high limits control. While Lazarowicz may not have been a speciliaist in heaters per se, he was a metallurgical engineer and had inspected defective electrical contacts for years as part of his employment. These qualifications made him competent to testify about the post-fire condition of the thermostat contacts and high limit control, which were in essence electrical contacts. The district court did not abuse its discretion in permitting him to testify.

Moreover, even if the plaintiffs' experts lacked specific expertise in heater, this matter went to the weight and not the admissibility of their testimony. See Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc., 125 F.3d 1176, 1183 (8th Cir. 1997) ("[T]he factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination.") (quoting Hose v. Chicago Northwester Transp. Co., 47 F.3d 277, 283 (8th Cir. 1995) ("Once the trial court has determined that a witness is competent to testify as an expert, challenges to the expert's skill or knowledge go to the weight to be accorded the expert testimony rather than to its admissibility.") (quoting Fox v. Dannenberg, 906 F.2d 1253, 1256 (8th cir. 1990)); Williams v. Pro-Tec, Inc., 908 F.2d 345, 348 (8th Cir. 1990) (holding that an expert's self-acknowledged lack of medical expertise went

to the weight rather that to the admissibility of his testimony).

The majority opinion views the testimony of the plaintiffs' experts as unreliable. Certainly expert testimony must be reliable. See Maj. Op. At 5,6. Reliability in the context of this case and under Rule 702 relates to the qualification of the experts, the foundation for their opinions, and their helpfulness to the jury. An expert's opinion should be excluded if it is fundamentally unsupported so that it can offer no assistance to the jury. See Arkwright, 125 F.3d at 1183. The plaintiffs' experts based their opinions on personal inspection of the evidence and applying knowledge acquired from training and experience. Their opinions rested on factual support. The district court did not abuse its discretion in determining that their opinions were reliable and could be considered by the jury.

Lazarowicz personally inspected the thermostat contacts and the high limit control. He saw that the surface of the contacts was serrated and that the contacts did not properly connect. He concluded in light of his knowledge and experience that these features contributed to the fire by causing the contacts to weld at the time of the fire. He saw that the high limit control was located behind a deflector shield. He Determined, again in light of relevant training and experience, that the high limit control Had failed to shut down the heater because the deflector shield prevented it from Detecting the heat build-up. When determining whether such evidence is sufficient to support the jury's verdict, the evidence must be viewed in the light most favorable to The plaintiffs, giving them the benefit of all inferences. See Stockmen's Livestock Market, Inc. v Norwest Bank of Sioux City, 135 F.3d 1236, 1240-41 (8th Cir. 1998). Lazarowicz's observation of the contact features and the placement of the

high limit control provided enough factual support for his opinions to justify submitting the issue of a product defect to the jury.

Freeman and Dolence personally inspected the evidence from the fire scene. Their opinions about the cause of the fire did not lack factual support. The condition of the sofa and the charring in the entryway supported Freeman's and Dolence's determination that the fire originated in the entryway. The charring in the entryway and the hole in the floor supported their determination that the fire originated near the heater. Freeman discovered a partially burned throw rug near the hole. Three frequent visitors to the Weisgram home testified that a throw rug in the entryway was frequently pushed up against the heater. These facts supported the determination that the throw rug was pushed up against the heater and caused heat to build up in the heater. Freeman and Dolence knew that the throw rug and the glue used on vinyl flooring had flashpoints within the range of temperatures produced by baseboard heaters. This knowledge supported their determination that the heat build-up ignited the throw rug and the glue. Dolence knew the heater could not overheat if the thermostat and the high limit control functioned properly. This justified his determination that those parts failed to shut down the heater at the time of the fire.

The plaintiffs' theory of causation depended primarily on circumstantial evidence. However, as discussed earlier, theories of fire causation must rely heavily on circumstantial evidence. There was enough evidence here for a reasonable jury to conclude that the fire originated as Freeman and Dolence testified. The fire investigators saw no other source of heat in the entryway other than the heater and no

combustibles were found other than the throw rug and glue.[12] The district court did not err in submitting the issue of causation to the jury.

The majority errs in a second regard. See Maj. Op. at 4 n 2. If the district court Erred in admitting the testimony of the plaintiffs' experts, the relief to be awarded is a New trial, not judgment as a matter of law. In Midcontinent Broadcasting Co. v North Central Airlines, Inc., 471 F.2d 357 (8th Cir. 1973), this court held that a new trial is The proper remedy for an error in the admission of expert testimony. See id. at 360. See also Schudel v General elec. Co., 120 F.3d 991, 995 (9th Cir. 1997); Jackson v Pleasant Grove Health Care Ctr., 980 F.2d 692, 695-96 (11th Cir. 1993); Douglass v Eaton Corp., 956 F.2d 1339, 1343-44 (6th Cir.) 1992). Neither Wright v Willamette Industries, Inc., 91 F.3d 1105 (8th Cir. 1996) nor Peitzmeier v Hennessy Industries, Inc., 97 F.3d 293 (8th Cir. 1996) has overruled Midcontinent Broadcasting. The new trial question was not before the court or discussed in either of those two cases.

In sum, the parties presented two reasonable theories about the cause of the fire. The experienced and able trial judge admitted the testimony of the plaintiff's experts. He also permitted expert witnesses to testify to Marley's theory of the case. A North Dakota jury evaluated the evidence and determined that the plaintiffs should recover Damages. As a court, we are only called upon to determine whether the district court Abused it discretion in permitting the experts to testify. Had the jury rendered a Verdict for Marley, we would not be in a position to say that the district court abused Its discretion in admitting the testimony of the defense experts. This controversy Represents a typical case to be

[12] Freeman had the hole beneath the heater checked for accelerants. None were found.

decided by a jury. This court ought not overturn both The trial judge and the jury. Accordingly, I dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and
On behalf of the heirs of
Bonnie Jo Weisgram, decedent,

Plaintiff,

-vs-

Marley Company, a Delaware
Corporation, and its subsidiary,
Marley Electric Heating Company,
A Delaware Corporation, and
United Dominion Industries, Inc.,
A Delaware Corporation,

Defendants.

State Farm Fire and Casualty
Insurance Company,

Plaintiffs,

-vs-

CIVIL NO. A3-95-104

Marley Company, a Delaware
Corporation, and its subsidiary,
Marley Electric Heating Company,

A Delaware Corporation, and
United Dominion Industries, Inc.,
A Delaware Corporation,

Defendants.

MEMORANDUM AND ORDER

This action was tried to a jury, which returned a verdict in favor of the plaintiffs. Before the court is defendant Marley's motion for judgement as a matter of law, pursuant to Rule 50 of the Federal Rules of Civil Procedure, and motion for a new trial, pursuant to Rule 59 of the Federal Rules of Civil Procedure (docket #76). The motions are opposed by the plaintiffs.

JUDGEMENT AS A MATTER OF LAW

The defendant brings a post-trial motion for judgement as a matter of law arguing that the evidence presented at trial does not support the jury verdict. In essence, defendant argues that the plaintiffs failed to establish that the electric baseboard heater manufactured by defendant was defective in any way. Plaintiffs disagree, arguing that the evidence clearly established that the fire in Bonnie Weisgram's home on December 30, 1993, was caused by a defective heater manufactured by defendant.

The standard on a Rule 50 motion for judgement as a matter of law is as follows:

> [T]he district court must (1) consider the evidence in the light most favorable to the prevailing party, (2)

> assume that all conflicts in the evidence were resolved in favor of the prevailing party, (3) assume as proved all facts that the prevailing party's evidence tended to prove, and (4) give the prevailing party the benefit of all favorable inferences that may reasonably be drawn from the facts proved. That done, the court must then deny the motion if reasonable persons could differ as to the conclusions to be drawn from evidence.

Haynes v. Bee-Line Trucking Co., 80 F.3d 1235, 1238 (8th Cir. 1996) (citations omitted). "Such a motion should be granted [only] 'when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party.'" Vetter v. Farmland Industries, Inc., No. 96-4286, 1997 WL 394703, at *7 (8th Cir. July 16, 1997) (citations omitted). "A jury verdict is to be overturned '[o]nly when there is a complete absence of probative facts to support the conclusion reached.'" Id. It is clear from the Eighth Circuit's language that the moving party's burden is substantial in a motion for judgment as matter of law.

In this case, both parties presented alternative theories, supported by expert testimony, of the cause of the fire in the Weisgram home. In this court's opinion, the jury could have decided in favor of either party based on the facts presented at trial. However, in this court's opinion, the defendant failed to recognize the weight that the jury would give to each of the experts' opinions. Clearly, the jury found the plaintiffs' experts' opinions more credible. Therefore, because there was sufficient evidence upon which a reasonable juror could find in favor of the plaintiff, the defendant's motion for judgement as a matter of law is DENIED.

NEW TRIAL

Defendant moves for a new trial on the grounds that the weight of the evidence did not support the jury's verdict and that the court made several prejudicial errors which entitle it to a new trial. Each of the defendant's stated grounds for a new trial will be addressed in turn.

The defendant first argues for a new trial based on the sufficiency of the evidence presented during trial. The Eighth Circuit Court of Appeals has outlined the standard this court must follow when addressing motions for new trial based on the weight of evidence:

> The district court has discretion to grant or deny a New trial based on its reading of the evidence. However, the trial court cannot usurp the function of a jury. The district court can only disturb a jury Verdict to prevent a miscarriage of justice. The Verdict must be against the 'clear weight,' 'overwhelming weight,' or 'great weight,' of the evidence for a new trial to be granted.

Beckman v. Mayo Foundation, 804 F.2d 435 (8th Cir. 1986) (citations omitted); see also White v. Pence, 961 F.2d 776, 781 (8th Cir. 1992). Therefore, the court "is not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." King v. Davis, 908 F.2d 1236, 1237 (8th Cir. 1992).

In this case, as noted above, it is clear that the jury's verdict for the plaintiff was not against the clear and overwhelming weight of the evidence presented. Contrary to

the defendant's arguments, the expert testimony presented at trial did not weigh heavily in its favor. Therefore, the defendant's motion for a new trial based on the weight of the evidence is DENIED.

The defendant's next argument for a new trial is that the plaintiffs' experts, namely Captain Dan Freeman, Ralph Dolence, and Sandy Lazarowicz, were not qualified to give expert testimony and that their opinions were inadmissible because they were based on improper scientific methodology. Plaintiffs disagree.

Rule 702 of the Federal Rules of Evidence permits "opinion testimony by experts when the witness is 'qualified as an expert by knowledge, skill, experience, training, or education, ' and 'if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine the fact in issue.'" McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1042 (2d Cir. 1995) (quoting Rule 702); see also Pestel v. Vermeer Mfg. Co., 64 F.3d 382, 384 (8th Cir. 1995) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S Ct. 2786, (1993)). In Daubert, the Supreme Court abandoned the Frye rule, requiring general acceptance in the relevant scientific community of the techniques utilized by the expert in reaching his opinion. Daubert, 113 S.Ct. at 2794. The Supreme Court in Daubert opinioned that the Frye standard was at odds with the liberal thrust of the Federal Rules of Evidence. Id. Therefore, Daubert granted the trial court the flexibility and discretion to determine whether expert testimony was trust worthy even though the techniques may not have won general scientific acclaim. Id. At 2798.

When scientific evidence is challenged, the trial judge serves as gate keeper, ensuring that any and all scientific testimony or evidence that is to be admitted is both relevant

and reliable. See Daubert, 113 S.Ct. at 2798-99 (1993).[1] However, "[t]he exclusion of an expert's opinion is proper only if it is 'so fundamentally unsupported that it can offer no assistance to the jury.'" Wood v. Minnesota Mining and Manufacturing Co., 112 F.3d 306, 309 (8th Cir. 1997) (citing Hose v. Chicago Northwestern Transp. Co., 70 F.3d 968, 974 (8th Cir. 1995)). The requirements of Rule 702 are liberal; if the witness meets the liberal minimum qualifications, then the level of the witness's expertise and the factual underpinnings of his testimony go to the weight, not admissibility, of the evidence. See Waitek v. Dalkon Sheild Claimants Trust, 934 F. Supp. 1068, 1086-89 n.10 (N.D. Iowa 1996); McKendall v. Crown Control Corp., No 95-56657, 1997 WL 448265, at *4 (9th Cir. August 8, 1997); Compton v. Subaru of America, Inc., 82 F.3d 1513 (10th Cir.), cert. denied, 117 S Ct. 611 (1996).

In this case, the court found no reason to exclude the testimony of any of the plaintiffs' experts during trial and is not convinced by defendant's arguments in the present motion. Each of the plaintiffs' experts was qualified to render the opinions given. Furthermore, each of the experts' opinions was well-grounded in established methodologies, and in this

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[1] Defendant argues that because the court refused to hold a Rule 104 hearing and rule on the admissibility of the plaintiffs' experts' testimony prior to trial, that it failed to properly exercise its gate keeping function. The court finds this argument to be without merit. The defendant's Rule 702 motion and request for a Rule 104 hearing (docket #55) was made on Friday, May 16, 1997, and the first day of trial was Monday, May 19, 1997. Defendant's motion was tardy. Although the court refused to postpone the trial in order to hold a Rule 104 hearing, the court heard argument by both sides during the pretrial conferenceand reserved ruling on the Rule 702 motion until a ruling could be made in the context of trial. The court fully exercised its gate keeping function during the course of the trial and the lack of a Rule 104 hearing prior to trial did not prejudice the defendant in any way.

court's view, the questions raised by defendant go to weight not admissibility.[2] Defendant's arguments address the factual underpinnings of the opinions and the accuracy of the conclusions reached by each of the experts. Therefore the opinions were admissible. This court agrees with the Supreme Court's view in Daubert that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the tradition and appropriate means of

[2] First, as to Captain Dan Freeman, it is clear that no Daubert problems were present. Freeman is a fire investigator for the Fargo Fire department and gave his opinion of the cause and point of origin of the fire in the Weisgram home. Freeman has been a fireman for almost 30 years and Captain for 19 years. Freeman is a certified fire investigator and has investigated many fires. Freeman investigated the Weisgram fire while on call for the Fargo Fire Department. Freeman's testimony was based on his experience as a fire investigator and examination of the fire scene while on duty. Therefore, Freeman's testimony was clearly admissible expert opinion under Rule 702.

Second, Ralph Dolence, who also testified regarding the cause and point of origin of the Weisgram fire, was qualified to give his opinion. Dolence was a fireman for 17 years and now serves as a fire investigator consultant. Dolence has investigated thousands of fires in his career. Dolence is a master electrician and has lectured at several seminars on electrically caused fires. Although defendant criticizes Dolence because of his lack of formal education, it is clear that he is a qualified expert through experience. Furthermore, Dolence's opinion was based on his investigation of the heater from the Weisgram home and photographs of the fire scene, utilizing well-established fire investigation techniques. Clearly, Dolence's testimony meets the liberal requirements of admissibility of Rule 702.

Third, Sandy Lzarowicz, who testified that the heater was defective due to the design of the electrical contacts within the heater, also presented no Rule 702 problems. Lazarowicz is a metallurgical engineer and materials scientist, receiving his degrees from Carnegie Mellon Institute. Throughout his career Lazarowicz has conducted failure analysis on various metals and electrical switches. Lazarowicz's testimony was based on his physical examination of the Weisgram heater and an exemplar heater manufactured by the defendant, utilizing well-established metallurgical engineering methods. Clearly, Lazarowicz's testimony was admissible under Rule 702.

attacking shaky but admissible evidence." Daubert, 113 S.Ct. at 2798. In this case, defendant does not give enough credit to the ability of juries in our system of justice to weigh or weed out weak expert testimony.[3] Therefore, defendant's motion for a new trial on Rule 702 grounds is DENIED.

The defendant's next argument for a new trial is that the court erred when it refused to allow into evidence photographs of defense experts' testing. According to defendant, the photographs were highly probative and were not overly prejudicial. In this court's opinion, the photographs were unnecessarily cumulative in light of the testimony of the defense experts. The tests conducted by Richard Moore and Russel Ogle were fully described and explained to the jury and the admission of photographs would have been cumulative and prejudicial, and therefore, inadmissible pursuant to Rule 403 of the Federal Rules of Evidence. See Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir. 1985). Therefore, defendant's motion for a new trial based on the exclusion of the photographs of its experts' testing is DENIED.

The defendant's next argument for a new trial is that the court's final jury instruction number nine, regarding circumstantial proof of a defect, was erroneous and misled the

[3] In this court's opinion, the Second Circuit Court of Appeals poetically summarized the defendant's arguments in this case:

> Trial judges must exercise sound discretion as gatekeepers of expert testimony under Daubert, [Defendant]...., however, would elevate them to the role of St. Peter at the gates of heaven, performing a searching inquiry into the depth of an expert witness's soul--separating the saved from the damned. Such an inquiry would inexorably lead to evaluating witness credibility and weight of the evidence, the ageless role of the jury.

McCullock, 61 F.3d at 1045

jury, resulting in a verdict for the plaintiffs. When instructing a jury, the court has broad discretion in the language of the charge as long as the entire instruction fairly and adequately contains the applicable law. See Garnes v. Gulf & Western Mfg. Co., 789 F.2d 637, 642 (8th Cir. 1986) (citing Ferren v. Richards Mfg. Co., 733 F.2d 526, 520 (8th Cir 1984)); See also Haynes v. Bee-Line Trucking Co., 80 F.3d 1235 (8th Cir. 1996) (reviewing a district court's jury instructions for inaccuracies under the applicable state law).

In this court's opinion, the challenged instruction is an accurate statement of the law applicable to this case. See Herman v. General Irrigation Co., 247 N.W.2d 472 (N.D. 1976); Schmidt v. Plains Elec., Inc., 281 N.W.2d 794 (N.D. 1979). Defendant argues that the Herman and Schmidt cases are no longer good law in light of the North Dakota Legislature's passage of a new products liability act and the Eighth Circuit's interpretation of that act. See N.D. Cent. Code § 28-01.3-06 (Supp. 1995); Reagan v. Hi-Speed Checkweigher Co., Inc., 30 F.3d 947, 949 (8th Cir. 1994). However, in this court's opinion, neither section 28-01.3-06 nor Reagan address the issue of how a plaintiff goes about proving the existence of a defect, especially when the product was destroyed or otherwise untestable. Therefore, because the challenged instruction is accurate and relevant in light of the evidence presented at trial, the defendant's motion for a new trial on that instruction is DENIED.

The defendant's next argument for a new trial is that the court questioned defendant's expert Michael Ply improperly and prejudiced the defendant's case as a result. The court disagrees. Rule 614(b) of the Federal Rules of Evidence provides that the court may interrogate witnesses to clarify and issue, elicit facts, or comment on evidence. A judge may reflect his view of evidence as long as it is made clear that the

jury is the final decision-maker with regard to the facts. Lewy v. Remington Arms Co., 836 F.2d 1104, 1110 (8th Cir. 1988). A judge is more than a mere moderator and at times it is proper for the judge to comment on the evidence being presented. Id. However, it is vital that the judge never cross the line from his role as a judge to that of an advocate. Id.; Jaeger v. Hemingson, 714 F.2d 773, 777 (8th Cir. 1983) (noting that Judge must assume the role of an advocate and that the judge's actions must prejudice a party's right to a fair trial for judicial questioning of a witness to be reversible error.)

In this case, the court did not overstep its bounds when it questioned Phy. The court's purpose in questioning Phy was to be sure that the jury understood that what Phy was testifying to was his opinion. The transcript clearly shows that Ply was testifying in a manner that led one to believe that he was making factual assertions rather than giving his opinion. The court's inquiry ended once it was made clear to the jury that Phy's testimony was his opinion. Moreover, any prejudice that may have resulted from the court's questioning was cured by the court's instruction to the jury regarding its role as the final decision maker with regard to credibility and that anything said by the court or the attorneys was not evidence. Therefore, defendant's motion with regard to the court's questioning of Phy is DENIED.

The defendant's next argument for a new trial is that the court erred when it allowed Captain Dan Freeman to testify as to his opinion of the cause and point of origin of the fire in the Weisgram home because Freeman was not listed as an expert witness in the Final Pretrial Order (docket #52). The Court disagrees. Rule 16(e) of the Federal Rules of Civil Procedure provides that final pretrial orders "shall control the subsequent course of the action unless modified by a subsequent order." The purpose of Rule 16 is to avoid ungair

surprise at trial. See 6a Wright and Miller 2d § 1522, p. 218; Control Data Corp. Securities Litigation v. Control Data Corp., 933 F.2d 616, 621 (8th Cir. 1990); Clarksville Montgomery County School Sys. v. U.S. Gypsum Co., 925 F.2d 993, 998 (6th Cir. 1991).

In this case, the court finds the defendant's arguments that Rule 16 was violated unpersuasive for several reasons. First, the court is of the view that the defendant could not have been surprised by the testimony given by Freeman in light of the fact that he was deposed by the defendant. Second, the court agrees with plaintiffs' assertion that it is inconceivable how Freeman could have testified about his investigation of the cause of the Weisgram fire without giving his opinion of the cause. Third, it is clear that Freeman was a qualified expert in the filed of fire investigation based upon his experience and training. Fourth, Freeman testified as a representative of the Fargo Fire Department and was not paid for his services by plaintiffs, and therefore, Rule 26 did not require plaintiffs to disclose Freeman as an expert witness. The fifth and final reason is that the court has not found any indication of the plaintiffs using sleight of hand to get Freeman's expert testimony into evidence. Therefore, defendant's motion for a new trial based on a Rule 16 violation is DENIED.

The defendant's final argument for a new trial is that the court erred when it permitted plaintiffs to introduce character evidence on the issue of damages. According to defendant, loss of consortium type damages are unrecoverable in North Dakota, and therefore, character evidence relevant only to mental anguish and loss of companionship was inadmissible. Along this line, defendant also challenges the court's final instruction number twenty-four, defining damages in a wrongful death action to include mental anguish, emotional

distress, and loss of society and companionship. According to defendant, the instruction is not supported by North Dakota law. Plaintiffs disagree.

Defendant presented a bench brief during trial requesting that the court prevent plaintiffs from presenting any character evidence on the issue of consortium type damages. The court was not persuaded then, nor is it now persuaded by the defendant's argument. Plaintiff Weisgram has provided the court with an excellent brief on the North Dakota law of wrongful death damages. As plaintiff notes, defendant has confused the idea of a derivative claim for consortium damages with the direct statutory cause of action for wrongful death. By statute in North Dakota, it is clear that wrongful death damages include noneconomic damages for mental anguish and loss of society and companionship. N.D. Cent. Code § 32-03.2-04 (1996). The court does not agree with defendant's argument that the North Dakota Supreme Court in Butz v. World Wide, Inc., 492 N.W.2d 88 (1992), intended to prevent a surviving child from recovering for loss of society, comfort and companionship, and mental anguish in a wrongful death action. Butz was a personal injury action and thus distinguishable from the present case. Therefore, the court's admission of character evidence on the issue of damages and instruction on wrongful death damages were not prejudicial error. Hence, defendant's motion for a new trial on those grounds is DENIED.

CONCLUSION

For the reasons noted, the defendant's motion for judgement as a matter of law and motion for a new trial are DENIED.

IT IS SO ORDERED.

Dated this 4th day of September, 1997.

RODNEY S. WEBB, CHIEF JUDGE
UNITED STATES DISTRICT
COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No 97-3735NDF

Chad Weisgram, ect., et al.,

Appellees,

vs.

Marley Company, etc., et al.,

Appellants

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge McMilliam would grant the petition.

The petition for rehearing by the panel is also denied.

(5128-010199)

April 26, 1999

Order Entered at the Direction of the Court:

s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit